



INFORMATION SHEET

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INFRINGEMENT: WHAT CAN I DO?

December 2005

This information sheet is for:

- people who are concerned that their copyright has been infringed by someone who has used their copyright material, without permission;
- people wishing to know whom they should contact about copyright piracy or infringement of copyright that other people own; and
- people who have been told that they have infringed someone else's copyright, or are concerned that they may have infringed copyright.

For information about the types of orders courts can make, and the penalties and remedies that may be available where copyright has been infringed, see our information sheet *Infringement: actions, remedies, offences and penalties*. For information on infringement of moral rights (such as a failure to attribute the creator of a work), see our information sheet *Moral rights*.

For information about our other information sheets, publications and training program, see our website <http://www.copyright.org.au> or contact us (see contact details at the bottom of the page).

The purpose of this information sheet is to give general introductory information about copyright. If you need to know about how the law applies in a particular situation, please get advice from a lawyer.

A Copyright Council lawyer may be able to give you free legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions, governments and libraries. For further information about the service, see <http://www.copyright.org.au> (click the Advice button) or our information sheet *Australian Copyright Council: who we are, what we do*.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key points

- Generally, it will be an infringement if someone uses a substantial part of copyright material, without the permission of the copyright owner, in a way exclusively reserved to the copyright owner.
- If your copyright has been infringed, there are a number of steps you can take without taking the matter to court.
- The Australian Copyright Council is not able to act on infringements of copyright. However, there are some industry organisations which you can notify.

When is copyright infringed?

The rights of the copyright owner

In Australia, copyright law is set out in the Copyright Act 1968 (Cth). In many cases, courts have had to interpret what the provisions mean, and how the Act applies to particular circumstances. The Act gives copyright owners the exclusive right to deal with their material in certain ways, including to reproduce it, to “communicate” it to the public (for example, by email distribution, or by making it available on a website); and to perform, screen or play certain types of copyright material “in public”. For further information on these rights, see our information sheet *An introduction to copyright in Australia*.

Infringement

Copyright is infringed when a person uses all, or a “substantial part”, of copyright material in one of the ways exclusively controlled by the copyright owner without the express or implied permission of the copyright owner, where no defence or exception to infringement applies.

What is a “substantial part”?

A “substantial part” is any important, distinctive or essential part of the original material, not necessarily a large part. There have been many court cases about whether reproducing part of a work constitutes an infringement of copyright. In one case, a court held that reproducing 6 notes from a piece of music was found to be an infringement.

A person may also use a “substantial part” of copyright material by paraphrasing, or closely following the structure and order of another person’s work, even if they have not directly reproduced any of it.

There are no guidelines about the quantity of material, or percentage of a work, which may be used without permission, since each case depends on its own facts.

*Coincidental similarity does **not** infringe*

If someone creates a copyright work that is very similar to yours, but the similarity is pure coincidence and they have not copied your work, then there is no copyright infringement. For copyright infringement to occur, there must be not only a similarity between the two works but also some evidence that the similarity results from copying, either directly or indirectly. (An indirect infringement may happen when the infringer has not had access to the original work but has had access to material based on or perhaps even merely describing the original work.)

Defences to infringement

There are some defences, or exceptions, to infringement, which allow certain uses of copyright material without permission—for example, where the use is a fair dealing for the purposes of criticism or review, research, or reporting news. There are also special provisions for copying by libraries, educational institutions and governments. In some cases, certain procedures must be followed, and sometimes fees must be paid.

Authorising an infringement

A person who “authorises” someone else to infringe copyright will themselves infringe copyright. Courts have said that to authorise someone means to “sanction, approve or countenance” their infringing conduct. A person may authorise someone to infringe copyright by telling them to do something that amounts to an infringement, or by permitting them to use equipment (such as photocopiers or CD burners) to infringe copyright.

Other ways infringement may occur

A person may also infringe copyright by:

- selling infringing copies of copyright material or distributing infringing copies;
- importing infringing copies of copyright material into Australia; and
- importing non-infringing copies of certain items (such as printed books or sheet music) without the copyright owner’s permission for sale or distribution;

- playing non-infringing copies of material in a digital format that have been imported without the copyright owner's permission; or
- permitting a place of public entertainment to be used for performances that infringe copyright.

What steps can a copyright owner take?

Get advice

It is generally a good idea to get legal advice about whether your copyright has been infringed. If only part of your material has been used, you may need advice about whether that part is “substantial” before taking action. You might also need advice about whether the person who used your work may have been entitled to use the material under any special exceptions. Sometimes, someone may have copied only the idea behind your material, and not infringed copyright.

In some cases, the Copyright Council's staff lawyers may be able to advise individual creators (such as writers, artists, photographers and composers) on whether their copyright has been infringed. We generally need to see a copy of your material as well as a copy of the allegedly infringing material, together with any relevant correspondence or other documents. For further information on who is eligible for this service, see our information sheet *Australian Copyright Council: who we are, what we do*. Note that we cannot represent people in legal proceedings or negotiate on your behalf.

If your work has been published and you suspect an infringement has taken place, you should notify your publisher, who may be in a position to take steps to resolve the matter. You may have an obligation to do this under your publishing contract.

If your copyright is being administered by a collecting society, you should notify the collecting society of the infringement as it may be able to deal with the matter or give you some help. Copyright collecting societies include the Australasian Performing Right Association (APRA, which controls the public performance and communication of music), Copyright Agency Ltd (CAL, which represents writers, illustrators and publishers) or VISCOPY (which licenses the reproduction of art works).

Decide what you want

You should decide how you would like the matter resolved and what you want from the infringing party. A lawyer may be able to help you work out what is appropriate. You may be entitled to demand any or all of the following:

- that the infringement stop (an “injunction”);
- that infringing copies of your material be delivered to you, or disposed of as you direct;
- that any master copies or plates used to make infringing copies be delivered to you, or disposed of as you direct; and
- that either you be paid for the use of the work or you be given the profits the infringer has made from it.

When deciding on how much money you are going to require the infringer to pay for use of the material, you could take into account what you would have charged if your permission had been obtained (a licence fee). However, it would generally be reasonable to ask for more than you would have charged, because your permission was not sought and you have had to chase the infringer and may have spent money on, for example, legal advice.

For further information on what legal remedies are available, see our information sheet *Infringement: actions, remedies, offences, penalties*. For a discussion of the kinds of issues that might be relevant to working out a licence fee, see our information sheet *Fees and royalties for use of copyright material*.

Contact the infringer

Once you are confident that you have a basis for your claim, and have worked out what you want from the infringer, you may be able to resolve the matter informally by contacting the person and explaining what you want them to do to resolve the matter. Often people don't mean to infringe copyright—they may do so through ignorance, or carelessness. In such cases, people may be willing to settle the matter in a friendly way.

If this approach doesn't work, or is not suitable, the next step is usually to send a letter of demand. A letter of demand should include the following:

- a statement that you are the copyright owner (or the basis on which you can make a claim);
- how you believe the person has infringed your copyright (for example, by reproducing your work on a website without your permission);
- a clear statement of what you require (for example, ceasing the infringing action, destruction of infringing copies and or payment of a stated sum of money);
- a time frame in which the demand(s) must be met (for example 14 days after the date of the letter); and
- a statement that further action may be taken if the demand(s) is not met within the specified time frame.

Copies of any relevant documentation referred to should be attached to the letter (for example, invoices, contracts, images or correspondence).

Before sending such a letter, check the facts. Note that, in some circumstances, letters claiming that someone has infringed copyright can result in problems under the law of defamation or under section 202 of the Copyright Act (which prohibits the making of groundless threats of legal proceedings). Therefore, it is a good idea to get legal advice on the issue before sending a letter of demand.

In some cases, if you are a professional creator, the Copyright Council's staff lawyers may be able to help you draft a letter to send on your own letterhead. For further information about the service, see <http://www.copyright.org.au> (click the Advice button). However, you should note that a letter sent on a lawyer's letterhead may be taken more seriously than a letter from you, even if your letter has been drafted by a lawyer. **It is therefore always worth considering getting a lawyer in private practice to draft a letter for you.** A lawyer in private practice may also be able to help you negotiate a settlement or take any necessary further action after the letter of demand has been sent. The Australian Copyright Council does not contact other parties, or negotiate settlements, on behalf of copyright owners.

Court action

If the matter is not settled after a letter of demand has been sent, you will need to decide whether you wish to take the matter to court. Generally, it is a good idea to get a lawyer to act for you, or to advise you on how to go about legal action and the likely result.

Which courts can decide copyright disputes?

The Federal Court of Australia, the Federal Magistrates Court and State and Territory courts all have jurisdiction to hear copyright infringement matters. Copyright owners will usually bring an action in the city closest to where they are located and which is most convenient for them. The choice of court may depend on factors including which remedies the copyright owner is seeking (some State courts do not have the power to grant injunctions or award an account of profits).

Generally, an individual wishing to bring an action should commence proceedings in the Federal Magistrates Court. The Registry at the Federal Magistrates Court provides assistance for self-represented litigants. While the Registry staff cannot give self-represented litigants legal advice, they can, amongst other things:

- briefly explain and answer questions about how the Court works;
- explain the Courts practices and procedures;
- explain what forms you may need to use and provide you with guides to help you fill them out;
- provide Court lists and information on how to get a case listed; and
- give you information about how your case is managed and the processes involved in each step along the pathway to a hearing.

For more information see: http://www.fedcourt.gov.au/litigants/general/registryservices_print.html.

Note that, in many cases, courts may refer you to formal alternative dispute resolution procedures such as mediation, conciliation or arbitration before listing your case for hearing.

Are there time limits for taking court action?

A court action for copyright infringement must be brought within six years of the date of the infringement.

Who may bring an action for infringement?

The owner of copyright, and any person to whom the copyright owner has granted an exclusive licence over the rights that have been infringed, may take legal action for copyright infringement.

How much does it cost to take court action?

If you decide to take court action you should discuss with your lawyer the costs of legal proceedings and the likely award of damages, before going ahead. Litigation can be very costly and may in some cases be too expensive to be worthwhile in view of the likely amount of damages.

In some cases, the court will order the losing party to pay the legal costs of the winner of a legal action. "Costs orders" are different from orders to pay damages (compensation) or an account of profits. The costs awarded generally do not cover the full amount the person has had to pay their lawyer.

Remedies and penalties

Civil remedies

Remedies the copyright owner may be able to obtain against a person who has infringed their copyright include "damages" or an "account of profits". "Damages" is a sum of money intended to compensate the copyright owner for money lost, or spent, in respect of the infringement and will vary with the circumstances. An "account of profits" is the profit made by the infringer in selling the infringing copies.

Courts may also order the infringer to "deliver up" all remaining infringing copies, and may award additional damages or an injunction prohibiting the infringer from continuing to infringe copyright.

For further information, see our information sheet *Infringement: actions, remedies, offences and penalties*.

Criminal penalties

In some circumstances, infringement of copyright is a criminal offence to which fines and jail terms may apply. The criminal provisions generally apply to commercial piracy, and are used particularly in relation to infringements of copyright in records, videos and computer software.

For further information, see our information sheet *Infringement: actions, remedies, offences and penalties*.

Infringements on the internet

If you believe an internet site infringes your copyright, the first person to contact is usually the webmaster, or the website proprietor. There are several search services that allow you to identify the people or company behind a website, including: www.geektools.com/whois.php. (When using this tool to check a website, leave out the prefix <http://www>).

If the webmaster refuses to remove the infringing material, you can contact the internet service provider (ISP) and ask it to take down the infringing website. **Do not take such action unless you are certain that the material being used is yours, and that the use of it has infringed your copyright.** Making false claims of infringement, especially where your actions could damage another person's financial interests, could make you liable for legal claims from the other person.

Under the Free Trade Agreement with the US, Australia has introduced new provisions concerning the liability of ISPs for infringing material on websites they host. For further information, see our information sheet *Free Trade Agreement amendments*.

These provisions are very complex, and you may need to get legal advice.

What should I do if someone says I have infringed their copyright?

If a person contacts you claiming that you have infringed their copyright, you should ensure that you get all relevant information as to the basis of their claim and the circumstances of your use of the material, before responding. Some claims of copyright infringement arise in the context of a dispute as to who owns copyright. Others relate to the extent of a licence to use copyright material. In other cases, a defence or exception to copyright infringement may apply.

In most cases, it should be possible to negotiate a solution to the dispute without court action. However, it is usually a good idea to get legal advice on whether the claim is justified. You should get this advice as soon as possible after being told that you have infringed copyright.

If you receive a formal letter of demand, or other documents indicating court action is contemplated, and you are unwilling to comply with the terms demanded by the person claiming an infringement, it is a good idea to get legal advice as a matter of urgency.

Reporting copyright infringements

It is **not** appropriate to “lodge a complaint” with the Copyright Council as the Council does not have any responsibility for, or power to enforce, compliance with copyright laws. Generally, it is up to the owner of copyright to take steps to deal with infringements, as outlined above.

There are some industry organisations which are interested in being notified of infringements of copyright in their members’ material:

- the Business Software Association of Australia (computer software). Contact details: <http://www.bsaa.com.au>; tel: 1800 021 143;
- the Australian Federation Against Copyright Theft, or AFACT (films, videos and DVDs). Contact details: <http://www.afact.com.au>; info@afact.com.au; PO Box 515, Mona Vale NSW 1660; tel: 1800 251 996; and
- Music Industry Piracy Investigations (music in any format). Contact details: <http://www.mipi.com.au>; mipi@mipi.com.au; PO Box Q20, Queen Victoria Building NSW 1230; tel: (02) 8569 1177.

If the relevant copyright is administered by a copyright collecting society, such as the Australasian Performing Right Association, which controls the public performance and communication of music (APRA: <http://www.apra.com.au>; tel: 02 9935 7900) or VISCOPY, which licenses the reproduction of art works (<http://www.viscopy.com>; tel 02 9280 2844, fax 61 2 9280 2855), it is a good idea to contact them about it. (See further our information sheet *Copyright Collecting Societies*.)

In some situations, a copyright infringement may amount to a criminal offence. Criminal infringements generally involve the deliberate use of copyright material for commercial purposes. The Federal Police generally determine whether to undertake criminal investigations in respect of an infringement. Actions for offences under the Act are generally instituted by the Federal Director of Public Prosecutions.

Common questions about infringement of copyright

What can I do if my copyright has been infringed overseas?

If your copyright is infringed overseas, you will generally need to get advice from a lawyer with expertise in the laws of the relevant industry, unless you can settle the matter informally. An action for infringement generally must be taken in the courts of the country in which the infringement occurred.

You may, however, have rights in Australia against a person who, without your permission, imports copies of your material into Australia for sale or other commercial purposes, or who sells such copies in Australia.

For more information, see our information sheet *Importing copyright items*.

If infringement occurs within a company or other organisation, who is liable?

An employee is generally personally liable for infringements committed by him or her. The employer may **also** be liable if it has **authorised** the employee to do an infringing act. Even if the employer has not authorised the employee to infringe copyright, it could be **vicariously liable** for the acts of its employees.

A director of a company may be personally liable for infringements committed by the company, but usually only where the director acts deliberately or recklessly.

A client has not paid me for work he commissioned. Is he infringing copyright by using it?

The general rule, unless there is an agreement to the contrary, is that where a person commissions someone else to create copyright material, the creator of the work owns the copyright in it, not the client. Note that different

rules apply in the case of certain material, such as films and sound recordings and where the client is a State, Territory or Commonwealth government.

Generally, even if there is no written or express licence, the client will have the right to use the work for the purposes for which it was commissioned. Therefore, the client will generally **not** infringe copyright in the work by using it in one of the ways agreed between the parties, even if they haven't yet paid for it. The copyright owner will, however, have the right to sue for the money owed.

If the parties had **agreed** that the client was not entitled to use the work until payment had been made, the client would infringe copyright by using the work in one of the ways exclusively reserved to the copyright owner before having paid for it.

Is plagiarism the same as copyright infringement?

Plagiarism generally means taking and using another person's ideas, writing or inventions as your own. Plagiarism is not a legal term, and not all acts of plagiarism are infringements of copyright. A student, academic or journalist may breach the ethical standards expected of him or her by presenting someone else's ideas as his or her own, but will not infringe copyright unless he or she has used a substantial part of a particular copyright work.

Generally, academic practice requires that you acknowledge other people's research and ideas. Further information on proper academic practice is generally available from university faculties or departments. Proper professional practice in other areas, such as the arts, is generally not written down and may vary depending on circumstances and viewpoints.

Note that acknowledging the source of material does not prevent you from being liable for copyright infringement: generally, permission is needed unless an exception applies.

How do I find a lawyer to represent me?

If you are considering commencing a copyright infringement action, it is generally a good idea to consider engaging a lawyer with expertise in copyright to advise and represent you.

The Copyright Council does not refer people to, or keep lists of copyright lawyers. We suggest that you contact the Law Society in your State or Territory (in Victoria, the Law Institute) which may be able to give you details of lawyers who practise in copyright law.

If you are an artist, a writer, a composer or otherwise involved in the arts, the Arts Law Centre of Australia may also be of interest to you and may be able to put you in touch with a copyright lawyer. They can be contacted at www.artslaw.com.au; tel: 1800 221 457.

Further information

For further information about copyright, see our website—<http://www.copyright.org.au/> or contact us.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au/> or telephone (02) 9356 2566.

Reproducing this information sheet

You may download and print one copy of this information sheet from our website for your reference, or you may purchase a printed copy from our online shop—<http://shop.copyright.org.au>—or direct from us.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.

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